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United States
Merit Systems Protection Board

Questions & Answers About Whistleblower Appeals

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UNITED STATES GOVERNMENT
Memorandum

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

September 5, 1991

MEMORANDUM FOR: All Customs Employees

FROM: Commissioner of Customs Carol Hallett

SUBJECT: Whistleblower Booklets

In my recent memorandum to you dated September 4, 1991, I advised that you would be receiving a publication on Whistleblowing, prepared by the Merit Systems Protection Board. Attached is the booklet entitled "Questions & Answers About Whistleblower Appeals." Please take a few moments to read it. I believe it will be helpful and informative.

Attachment

United States
Merit Systems Protection Board

Questions & Answers About Whistleblower Appeals

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Introduction

On July 9, 1989, the Whistleblower Protection Act of 1989 (Public Law No. 101-12) became effective. The Congress enacted this law to strengthen protections for Federal employees, former employees, and applicants for employment who claim that they have been subject to personnel actions because of their whistleblowing activities. The Act made significant changes affecting appeals by whistleblowers to the U.S. Merit Systems Protection Board (MSPB or the Board).

This publication provides information about your rights when you appeal a personnel action to MSPB and claim that it was based on your whistleblowing activities. The information covers the unique provisions of the Whistleblower Protection Act and the Board's regulations that apply to whistleblower appeals. Information on procedures that apply to *all* Board appeals is contained in a separate MSPB publication entitled "Questions and Answers About Appeals," which you can obtain from any MSPB office.

In July 1989, the Board published a new Part 1209 of its regulations to govern whistleblower appeals and requested comments on these interim regulations. The regulations were then revised extensively and published as *final* regulations in the Federal Register on July 12, 1990. [The final regulations, which supercede the interim regulations, will be codified in Title 5 of the Code of Federal Regulations (CFR), Chapter II, Part 1209.] The Board's regulations governing appeals generally are contained in 5 CFR Part 1201. Since the Part 1209 regulations contain *only* the special provisions applying to whistleblower appeals, they must be used in conjunction with Part 1201. The discussion of whistleblower appeals in this publication is not all-inclusive, nor is the information regulatory in nature. Such appeals are governed by the pertinent statutes, regulations, and case law.

The information in this publication is based on the Board's final Part 1209 regulations published July 12, 1990. This edition of the publication supercedes the October 1989 edition, which was based on the interim regulations.

Whistleblowing and Whistleblower Appeal Rights

It is a prohibited personnel practice for an agency to subject you to a personnel action if the action is threatened, proposed, taken, or not taken because of your whistleblowing activities. Whistleblowing means disclosing information that you reasonably believe is evidence of a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. You are protected if you make such a disclosure to the Special Counsel, the Inspector General of an agency, or another employee designated by an agency head to receive such disclosures. You are also protected if you make such a disclosure to any other individual or organization (e.g., a congressional committee or the media), provided that the disclosure is not specifically prohibited by law and the information does not have to be kept secret in the interest of national defense or the conduct of foreign affairs.

The Civil Service Reform Act of 1978 (CSRA) established both the Merit Systems Protection Board and the Office of Special Counsel. As a Federal employee, you have the right to appeal certain personnel actions taken against you to the Board. If you

are subject to a personnel action that you believe is the result of a prohibited personnel practice, you have the right to file a complaint with the Office of Special Counsel and ask the Special Counsel to seek corrective action from the Board.

Prior to the Whistleblower Protection Act, a whistleblower could appeal directly to the Board only if the personnel action being appealed came within the Board's jurisdiction. Actions that are directly appealable to the Board include adverse actions, performance-based removals or reductions in grade, denials of within-grade salary increases, reduction-in-force actions, and denials of restoration or reemployment rights.

The Special Counsel has jurisdiction over prohibited personnel practice complaints with respect to a broader range of personnel actions, including appointments, promotions, details, transfers, reassign-

ments, and decisions concerning pay, benefits, awards, education, or training. Therefore, a whistleblower could file a complaint with the Special Counsel with respect to most personnel actions allegedly based on whistleblowing. If a whistleblower filed a complaint with the Special Counsel and the Special Counsel did not seek corrective action from the Board, no further recourse was available, unless the action was directly appealable to the Board.

Under the Whistleblower Protection Act, a whistleblower gained the right to appeal directly to the Board if he or she first complains to the Special Counsel and the Special Counsel does not seek corrective action on his or her behalf. This right exists with respect to any personnel action that can be the subject of a prohibited personnel practice complaint to the Special Counsel, even though the action may not be directly appealable to the Board.

The Whistleblower Protection Act does not affect the right of a whistleblower to appeal directly to the Board if he or she is subject to a personnel action that is appealable to the Board under any other law, rule, or regulation.

Two Kinds of Whistleblower Appeals

There are two kinds of whistleblower appeals. The principal difference between the two is in the way they reach the Board.

In the first kind of case, the individual is subject to a personnel action that is directly appealable to the Board, and the individual claims that the action was taken because of his or her whistleblowing. This kind of case is referred to by the Board as an "otherwise appealable action," and the individual may file an appeal directly with the Board after the action has been effected.

The second kind of case was created by the "Individual Right of Action" provision of the Whistleblower Protection Act. In this kind of case, the individual is subject to a personnel action and claims that the action was taken because of his or her whistleblowing, but the action is *not* one that is directly appealable to the Board. In this kind of case, the individual can appeal to the Board *only* if he or she files a complaint with the Special Counsel first and the Special Counsel does *not* seek corrective action on the individual's behalf. This kind of case is referred to by the Board as an "individual right of action" appeal.

An individual who is subject to a personnel action that is directly appealable to the Board, and who claims that the action was taken because of his or her whistleblowing, may *choose* to file a complaint with the Special Counsel rather than appeal to the Board. If the Special Counsel does not seek corrective action on his or her behalf, the individual may then appeal to the Board. While this is considered an "otherwise appealable action," the time limits for filing are the same as for an "individual right of action" appeal.

Questions & Answers

Who may file whistleblower appeals with the Board? 1

Because an individual right of action appeal can be filed with the Board only after the individual has first complained to the Special Counsel, the individuals eligible to file this kind of appeal are the same as those who may file prohibited personnel practice complaints with the Special Counsel. Under the prohibited personnel practices statute, covered employees include competitive service employees and most excepted service employees in an Executive agency, the Administrative Office of the U.S. Courts, and the Government Printing Office, *except* for employees of a Government corporation, the General Accounting Office, the FBI, and various intelligence agencies. Former employees of and applicants for employment with covered agencies may also file complaints with the Special Counsel. If the Special Counsel does not seek corrective action on behalf of a whistleblower covered by the statute, the individual then becomes eligible to appeal directly to the Board.

In the case of an otherwise appealable action, any employee eligible to appeal the particular action can appeal directly to the Board. Covered employees

vary for each appealable action. The law, rules, or regulations applying to the particular action being appealed govern who may appeal that action. In general, competitive service and preference-eligible employees have Board appeal rights with respect to most appealable actions. Most excepted service employees may appeal adverse actions and performance-based actions. Former employees and applicants for employment can appeal some actions. Certain categories of employees, such as political appointees, and employees of certain agencies, are excluded with respect to some actions.

If there is any question as to whether you come under the jurisdiction of the Special Counsel with respect to prohibited personnel practices, or under the Board's jurisdiction with respect to appealable actions, you should file your complaint or appeal in order to preserve your appeal rights.

How do I file a whistleblower appeal with the Board? 2

You must file your appeal in writing with the Board's regional office serving the area where your duty station was located when the action was taken. (The Board's 11 regional offices and the geographic areas they serve are listed in the back of this publication.) This requirement applies to *all* whistleblower appeals, both otherwise appealable actions and individual right of action appeals.

Your appeal must contain all of the information required by the Board's Part 1201 regulations for other types of appeals. In addition, your appeal must contain a description of your whistleblowing disclosure and a chronology of facts concerning the personnel action—including the name and position of the person or persons taking the action. You must also provide evidence or argument that you were or will be subjected to a personnel action—or that such an action has been threatened—and that the action was or will be based on your whistleblowing. In the case of a threatened action, you must provide the specific indications giving rise to your apprehensions. If you have sought corrective action from the Special Counsel first, you must also provide evidence that your appeal is being filed within the required time limits.

3 *What are the required time limits for filing a whistleblower appeal?*

The time limits are different for an otherwise appealable action and for an individual right of action appeal.

The time limits for filing an otherwise appealable action are the same as for all other direct appeals to the Board. You must file within 20 calendar days of the effective date of the action or, in the case of actions that do not set an effective date, within 25 days of the date of issuance of the decision. (If the filing deadline falls on a Saturday, Sunday, or Federal holiday, the filing deadline is extended to the next working day.) However, if you have been subjected to an otherwise appealable action and you choose to seek corrective action from the Special Counsel first, the time limits for appealing to the Board are the same as for an individual right of action appeal.

The time limits for filing an individual right of action appeal depend on what the Special Counsel does with your complaint. If the Special Counsel notifies you that the office is terminating its investigation of your complaint, you have 65 days from the date of the Special Counsel's written notice to file an individual right of action appeal with the Board. If 120 days pass after you file a complaint with the

Special Counsel and that office has *not* notified you that it will seek corrective action on your behalf, you may file an individual right of action appeal with the Board anytime thereafter.

If you ask the Board to *stay* the personnel action before you file your appeal, you must file your appeal within 20 days after the Board rules on the stay request.

What is a "stay" and how does it apply to whistleblower appeals?

4

A stay orders the agency to suspend the personnel action being appealed. You may file a stay request with the Board in connection with *either* kind of whistleblower appeal—an otherwise appealable action or an individual right of action appeal. You may file a stay request at any time after you become eligible to file your appeal, but no later than the time limit the judge sets for close of discovery in the appeal. You may file a stay request before, at the same time as, or after you file your appeal. If you file the stay request first, you must file your appeal within 20 days after the date of the order ruling on the stay request.

5 *How do I file a stay request with the Board?*

You file a stay request in writing with the same Board regional office where you file your appeal. You may file the request by personal delivery, by facsimile, or by mail. The request must contain your signature or the signature of your representative, if you have one. When you file your stay request with the Board regional office, you must also serve a copy of the request on the agency's local servicing personnel office or on the agency's representative, if the agency has designated one. You must include a certificate of service with your stay request, stating how and when service was made on the agency.

Your stay request must identify you, the agency, and your representative, if you have one. You must provide a chronology of the facts, including a description of your whistleblowing disclosure and the action that the agency has threatened, proposed, taken or not taken. You must also provide evidence or argument showing that the action is a personnel action, that it was or will be based on your whistleblowing, and that there is a substantial likelihood that you will prevail on the merits of the appeal. You must include evidence or argument addressing how long the stay should remain in effect, and you may address the question of whether a stay would impose extreme hardship on the agency. If you first sought corrective action from the Special Counsel, you must provide evidence that the request is timely filed. Any documentary evidence supporting your stay request must also be included.

How does the Board decide on a stay request?

6

The Board must allow the agency an opportunity to comment on the stay request, and the administrative judge may hold a hearing on the request. If the administrative judge determines that granting the stay is appropriate, he or she will grant it within 10 calendar days (excluding Saturdays, Sundays, and Federal holidays) of the date the request was received in the Board regional office.

If the stay is granted, the administrative judge's order will specify the time period the stay will remain in effect. The stay remains in effect during that time period, or until the Board issues a final decision on your appeal, or until the stay is vacated or modified, whichever occurs first. If the agency does not comply with the stay order, you may petition the Board for enforcement of the stay.

If your stay request is not granted, you may ask the administrative judge to refer the matter to the Board as an "interlocutory appeal" of the judge's ruling. If the judge does this, the Board will issue a decision, and the judge will then act in accordance with the Board's decision. Interlocutory appeals of an administrative judge's rulings are governed by Part 1201 of the Board's regulations.

7 *What are the burden of proof and degree of proof in whistleblower appeals?*

Under the Whistleblower Protection Act, the Board *must* order corrective action if you demonstrate that your whistleblowing was a contributing factor in the personnel action threatened, proposed, taken, or not taken against you. You have the burden of proving by a preponderance of the evidence that your whistleblowing was a contributing factor in the personnel action.

The Board will not order corrective action, however, if the agency demonstrates by clear and convincing evidence that it would have taken the same action in the absence of your whistleblowing.

The Congress intended that these provisions would ease the whistleblower's burden of proving that an action was taken because of his or her whistleblowing, and, at the same time, would hold the agency to a higher standard in proving that it would have taken the action in the absence of the whistleblowing.

8

If I file a whistleblower appeal with the Board after the Special Counsel has terminated an investigation of my complaint, will that termination influence the Board's decision?

No. Under the Whistleblower Protection Act, when the Board considers your appeal, it may *not* take into account the Special Counsel's decision to terminate an investigation of your complaint. Moreover, if you file your appeal because 120 days have passed without your being notified that the Special Counsel will seek corrective action on your behalf, the Special Counsel may *not* proceed to seek corrective action without your permission. Furthermore, the Special Counsel may not intervene in your appeal before the Board without your permission.

9 *What can I do if I am not satisfied with the Board's decision on my whistleblower appeal?*

As is the case with other decisions on appeals to the Board, you have the right to ask the 3-member Board in Washington to review the initial decision of the administrative judge. You do this by filing a petition for review in accordance with the Board's regulations in Part 1201. If no party files a petition for review, the initial decision of the administrative judge becomes final 35 days after it is issued. If a petition for review is filed, the decision issued by the Board becomes the final decision.

You may request judicial review of a final Board decision on your whistleblower appeal—either an initial decision of an administrative judge that has become final or the Board's decision on a petition for review—by the U.S. Court of Appeals for the Federal Circuit. You must file a request for judicial review within 30 days of your receipt of the Board's final decision.

For Additional Information

The Board's regulations are found in Chapter II, Parts 1200 through 1209, of Title 5 of the Code of Federal Regulations (CFR). The Federal Register of July 12, 1990 contains the Board's final Part 1209 regulations. Copies of the Board's regulations are available at any Board office, agency libraries, agency personnel or administrative offices, and most public libraries.

Your agency personnel office can provide additional information or you can contact the Board regional office serving your area. For information on filing a petition for review with the Board, contact the Clerk of the Board, U.S. Merit Systems Protection Board, 1120 Vermont Avenue, NW., Washington, DC 20419.

Because the Board is prohibited by law from giving advisory opinions, Board personnel *may not* discuss with you the merits of any appeal you or another party may bring to the Board. However, Board personnel will be pleased to answer any questions you may have about Board procedures and the processing of appeals.

For information regarding the processing of whistleblower complaints by the Special Counsel, contact the Office of Special Counsel, 1120 Vermont Avenue, NW., Washington, DC 20005.

MSPB Regional Offices

Atlanta Regional Office

401 West Peachtree Street, NW.
10th Floor
Atlanta, GA 30308
(404) 730-2751
FAX (404) 730-2767

Alabama, Florida, Georgia, Mississippi, North Carolina, and South Carolina

Boston Regional Office

10 Causeway Street
Room 1078
Boston, MA 02222-1042
(617) 565-6650
FAX (617) 565-5903

Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont

Chicago Regional Office

230 South Dearborn Street
31st Floor
Chicago, IL 60604-1669
(312) 353-2923
FAX (312) 886-4231

Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin

and Areas Served

Dallas Regional Office

1100 Commerce Street
Room 6F20
Dallas, TX 75242-1001
(214) 767-0555
FAX (214) 767-0102

Arkansas, Louisiana, Oklahoma, and Texas

Denver Regional Office

730 Simms Street
Suite 301
P.O. Box 25025
Denver, CO 80225-0025
(303) 236-2710
FAX (303) 233-5438

Arizona, Colorado, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Utah, and Wyoming

New York Regional Office

26 Federal Plaza
Room 3137
New York, NY 10278
(212) 264-9372
FAX (212) 264-1417

New York, Puerto Rico, Virgin Islands, and the following counties in New Jersey: Bergen, Essex, Hudson, Hunterdon, Morris, Passaic, Somerset, Sussex, Union, and Warren

Philadelphia Regional Office

U.S. Customhouse, Room 501
Second & Chestnut Streets
Philadelphia, PA 19106-2904
(215) 597-9960
FAX (215) 597-3456

Delaware, Pennsylvania, Virginia (except cities and counties served by Washington Regional Office - see below), West Virginia, and the following counties in New Jersey: Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Mercer, Middlesex, Monmouth, Ocean, and Salem

St. Louis Regional Office

911 Washington Avenue
Room 615
St. Louis, MO 63101-1203
(314) 425-4295
FAX (314) 425-4294

Iowa, Kentucky, Missouri, and Tennessee

San Francisco Regional Office

525 Market Street
Room 2800
San Francisco, CA 94105-2789
(415) 974-9703
FAX (415) 467-8352

California

Seattle Regional Office

915 Second Avenue
Room 1840
Seattle, WA 98174-1001
(206) 442-0394
FAX (206) 442-6484

Alaska, Hawaii, Idaho, Oregon, Washington, and Pacific overseas areas

Washington Regional Office

5203 Leesburg Pike
Suite 1109
Falls Church, VA 22041-3473
(703) 756-6250
FAX (703) 756-7112

Washington, DC, Maryland, all overseas areas not otherwise covered, and the following cities and counties in Virginia: Alexandria, Arlington, Fairfax City, Fairfax County, Falls Church, Loudoun, and Prince William

October 1990

UPDATE

MSPB INFORMATION PUBLICATIONS

Please note the following changes in geographic jurisdication for the Chicago and St. Louis Regional Offices:

Chicago

Illinois (all locations north of Springfield), Indiana, Michigan, Minnesota, Ohio, and Wisconsin

St. Louis

Illinois (Springfield and all locations south), Iowa, Kentucky, Missouri, and Tennessee

Please note the following new phone numbers for the Denver and San Francisco Regional Offices:

Denver

(303) 231-5200
FAX (303) 231-5205

San Francisco

(415) 744-3081

August 1991

U.S. Merit Systems Protection Board
1120 Vermont Avenue, NW.
Washington, DC 20419